



## Yale Human Rights and Development Law Journal

Volume 11

Issue 1 *Yale Human Rights and Development Journal*

Article 4

2008

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### Recommended Citation

Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L.J. (2008).

Available at: <https://digitalcommons.law.yale.edu/yhrdlj/vol11/iss1/4>

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## Article

# Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice

Matthew Genasci<sup>†</sup> and Sarah Pray<sup>††</sup>

*While corporate social responsibility (CSR) is important to economic development and baseline human rights in countries dependent on extractive industry revenues, failures in governance—such as the absence of basic services like health care and electricity—require new strategies and incentives to encourage governments to play their traditional role more effectively. Political economic theories of the “resource curse” see the breakdown of a sense of government accountability to its people as one of the more destructive aspects of excessive reliance on natural resource rents. The authors look to recent innovations such as transparency projects that can reinvigorate a sense of government accountability, among other positive outcomes. The authors argue that both mandatory and voluntary models of CSR could have an adverse impact on sustainable development so long as they focus exclusively on the role of the corporation rather than the on ways corporate investment might be used to create incentives for a more effective state role.*

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## I. INTRODUCTION

In recent years, record high commodities prices—and record profits for extractive firms—have brought the failure of many resource-rich countries to achieve equitable economic development to the forefront. In a country like Equatorial Guinea, where oil revenues place it second in the world in terms of GDP per capita,<sup>1</sup> sixty percent of the population continues to live on less than one dollar per day.<sup>2</sup> In many other resource-rich countries, development of the mineral sector has also failed to result in any meaningful improvement of living standards for the majority of citizens, often making non-extractive sectors and society as a whole worse off.<sup>3</sup> An increasing number of researchers and activists across disciplines have turned their attention toward this seeming paradox, commonly referred to as the “resource curse.” Efforts to identify and address the causes of the resource curse have produced a number of theories. The dominant understanding of this phenomenon emphasizes that dependence on natural resource rents impedes the development and proper functioning of state institutions. It is a political and economic phenomenon, at the heart of which is the diminution of governmental accountability to its people. This lack of accountability and failure of state capacity underlie many of the problems commonly observed in countries that are heavily dependent on the extractive industries—problems ranging from inadequate protection of human rights and the environment to the unavailability of essential services and infrastructure.

Extractive companies operating against the backdrop of resource curse dynamics are often caught in the middle, as they search for ways to both avoid blame for these state failures and mitigate their impact. Corporate social responsibility (CSR) is an umbrella term covering the variety of means by which companies seek to respond to these demands. In this paper, we explore how improved understanding of the resource curse should transform CSR theory and practice. We argue that a CSR agenda that focuses on the more observable needs of extractive communities to the exclusion of engagement with the extractive industry’s impact on state institutions and behaviors is inadequate at best and may well be detrimental to long-term economic and social development. While the creation of unsustainable dependencies is a risk that CSR programs face in any sector, we argue that the risks are greater in the context of the extractive industries because of the dynamics of the resource curse. In

1. INT’L MONETARY FUND, WORLD ECONOMIC OUTLOOK: GLOBALIZATION AND INEQUALITY 219 (2007), available at <http://www.imf.org/external/pubs/ft/weo/2007/02/pdf/text.pdf>.

2. INT’L MONETARY FUND, REPUBLIC OF EQUATORIAL GUINEA: 2006 ARTICLE IV CONSULTATION STAFF REPORT 25 (2006) available at <http://www.imf.org/external/pubs/ft/scr/2006/cr06233.pdf>.

3. See generally Jeffrey D. Sachs & Andrew M. Warner (Nat’l Bureau of Econ. Research, Working Paper No. 5398, 1995), available at <http://www.earth.columbia.edu/sitefiles/File/about/director/pubs/517.pdf>.

making this argument, we focus on the theoretical underpinnings of CSR and on what research into the complex phenomenon of the resource curse may tell us about future directions for CSR theory and practice.

Part II looks at the evolution of the concept of CSR, and Part III gives an overview of research into the political economy of the resource curse. Part IV looks more closely at the interactions of these two bodies of literature, concluding that CSR should address the key issues of governance and accountability in resource-rich states by incorporating support for the social contract between people and states. Part V explores the practical implications and limits of this conclusion, arguing that an emphasis on transparency—both on a voluntary basis and through support for compulsory state-wide initiatives—ought to form the cornerstone of extractive industry CSR programs. This section then looks more closely at resource-rich states' troubling failure to consistently capture an adequate share of their resource rents, concluding that this failure highlights the limitations on CSR's ability to address some of the root causes of the resource curse.

## II. WHAT IS CSR?

Contemporary notions of CSR are in many ways a direct challenge to Milton Friedman's exhortation that "there is only one social responsibility of business: to use its resources and engage in activities designed to increase its profits . . . ."<sup>4</sup> The growing recognition that corporations are an integral part of society and play an important role in the development of the communities in which they operate has driven CSR proponents of different stripes to define the proper contours of the business-society relationship. These efforts have led to widespread acceptance of the concept of CSR, despite a lack of consensus on what exactly it entails.<sup>5</sup> Definitions of CSR have evolved over time, with the World Business Council for Sustainable Development (WBCSD) initially defining CSR as business behaving ethically while contributing to the economic development of its employees and the broader community,<sup>6</sup> and subsequently changing the definition to incorporate notions of businesses' commitment to "contribute to sustainable development,"<sup>7</sup> a notion also reflected in the World Bank's working definition.<sup>8</sup> Other definitions of CSR

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4. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 124.

5. See, e.g., Bede Nwete, *Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?*, 8 GERMAN L.J. 311, 312-15 (2007).

6. Michael Blowfield & Jędrzej George Frynas, *Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World*, 81 INT'L AFF. 499, 501 (2005).

7. *Id.*

8. See HALINA WARD, CORPORATE SOCIAL RESPONSIBILITY PRACTICE OF THE WORLD BANK GROUP, PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: TAKING STOCK 3 (2004), available at <http://www.iiied.org/pubs/pdfs/16014IIED.pdf>.

have integrated the concept of the “triple bottom line,” which posits that a corporation’s mandate should encompass financial, social and environmental performance goals.<sup>9</sup>

Unsurprisingly, CSR means different things to different groups, with companies unlikely to share the same view as NGOs, and researchers likely to take a different tack than practitioners. For some, CSR consists of voluntary activity or the implementation of international codes of conduct, while others see a role for regulations and hard law in the CSR landscape. CSR can demand direct engagement with local communities or simply require adoption of a particular philosophical approach to doing business.<sup>10</sup> CSR can represent a free-market-friendly alternative to government regulation,<sup>11</sup> or it can posit an obligation on the part of companies to assume responsibility for the consequences of their actions.<sup>12</sup> Environmental and human rights protections tend to feature heavily in CSR agendas.<sup>13</sup> Other common projects include the construction of health and education facilities, water treatment programs, and infrastructure projects such as roads and bridges.<sup>14</sup>

Whatever its definition, CSR has been embraced by a wide variety of companies today, particularly multinational extractive companies, as a means to achieve a variety of largely laudable objectives. Whereas these programs once focused primarily on public relations vis-à-vis home country shareholders, consumers and activists,<sup>15</sup> CSR programs increasingly rely upon a broader stakeholder concept, targeting the relationship between the company and the community in which it operates. Current CSR trends reveal a gradual move away from

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9. Cynthia Williams & Ruth Aguilera, *Corporate Social Responsibility in a Comparative Perspective*, in OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 452, 466 (Andrew Crane et al., eds. 2008).

10. See Daniela Ebner & Rupert Baumgartner, *The Relationship Between Sustainable Development and Corporate Social Responsibility* 7 (Sept. 4-5, 2006).

11. See Blowfield & Frynas, *supra* note 6, at 502.

12. See Frederick Bird & Joseph Smucker, *The Social Responsibilities of International Business Firms in Developing Areas*, 73 J. BUS. ETHICS 1, 6 (2007).

13. E.g. SHELL, *THE SHELL SUSTAINABILITY REPORT 2005* (2005), available at <http://sustainabilityreport.shell.com/servicepages/welcome.html>; BRITISH PETROLEUM, *BRITISH PETROLEUM SUSTAINABILITY REPORT 2006* (2006), available at <http://www.bp.com/download.do?categoryId=9010741&contentid=7022970>; CONOCOPHILLIPS, *2006 SUSTAINABLE DEVELOPMENT REPORT* (2006), available at <http://www.conocophillips.com/NR/rdonlyres/B19C00AC-6154>; EXXONMOBIL, *2006 CORPORATE CITIZENSHIP REPORT* (2006); CHEVRON *CORPORATE RESPONSIBILITY REPORT* (2006); FREEPORT MCMORAN COPPER & GOLD INC., *THE ELEMENTS OF SUSTAINABLE DEVELOPMENT: 2005 WORKING TOWARD SUSTAINABLE DEVELOPMENT REPORT* (2005), available at <http://www.fcx.com/envir.report.htm>; NEWMONT MINING, *NOW & BEYOND: CORPORATE SUSTAINABILITY REPORT* (2005), available at <http://www.beyondthemin.com>.

14. See, e.g., EXXON, *supra* note 13, at 44-46; CONOCOPHILLIPS, *supra* note 13, at 52-55; FREEPORT MCMORAN, *supra* note 13, at 5.

15. These concerns play an especially important role in CSR in the extractive industries in light of the high profile disasters and conflicts—such as the ExxonMobil Valdez spill, the Bhopal explosion and the execution of Nigerian activist Ken Saro-Wiwa—that have brought increased scrutiny on their operations. Chris Marsden, *The New Corporate Citizenship of Big Business: Part of the Solution to Sustainability*, 105 BUS. & SOC. REV. 9, 10 (2000).

headquarters-based CSR programs toward greater engagement at the community level.<sup>16</sup> This shift in focus has been driven by increasing interest on the part of companies in their role in sustainable development (an interest reflected in the changing definitions of CSR) and, perhaps more significantly, by their interest in fostering more stable operating environments through CSR activities aimed at placating communities or mitigating locally manifest externalities.

CSR is not without its critics. To put it bluntly, there are those that believe CSR goes too far and those that believe it does not go far enough or, rather, is misdirected. Those in this latter category often point out that CSR agendas reflect the concerns of stakeholders in high-income countries, and as such do not address the problems that truly need addressing.<sup>17</sup> The move toward more inclusive stakeholder approaches has mitigated this dynamic to some extent, but there is no lack of anecdotal evidence supporting the idea that companies' engagement with local communities is often a flawed process.<sup>18</sup> Others in this camp believe that current CSR practices do not adequately take into account the most important effects of business activity on local communities but, rather, divert attention from them.<sup>19</sup> This may be a result of deliberate "greenwashing," or pursuing projects for public relations purposes with no intention of addressing real needs, or it may be from a lack of effort or understanding. Critics of current CSR practices argue that often projects are not directed at the most significant externalities of the relevant companies' economic activity.<sup>20</sup> For

16. For example, in its Sustainability Report in 2005, Shell wrote:

We have changed how we manage our social investment. We are focusing our programmes increasingly on responding directly to issues linked to our business. Since we are not community development experts, we form partnerships with people who are – development NGOs, international agencies and national organisations. We encourage local communities to be closely involved in designing and running projects.

SHELL, *supra* note 13, at 23-24.

17. See Ward, *supra* note 8, at 7-8.

18. See Jędrzej George Frynas, *The False Development Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies*, 81 INT'L AFF. 581, 584-85 (2005). In CSR literature, one finds significant criticism of how corporations engage with these communities. Some argue that company relationships with communities have tended to be limited in scope and include short visits to elicit requests for specific assistance. Others argue that, for the sake of time and expediency, companies have made certain assumptions about the community, including what defines the actual community and who has authority to negotiate with the company, and have perhaps overlooked things such as conflicts of interests or questions of legitimacy of community leaders. See, e.g., Paul Kapelus, *Mining, Corporate Social Responsibility and the "Community": The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi*, 39 J. BUS. ETHICS 275, 282 (2002).

19. See, e.g., MANUEL RIESCO, U.N. RES. INST. FOR SOC. DEV. PAY YOUR TAXES! CORPORATE SOCIAL RESPONSIBILITY AND THE MINING INDUSTRY IN CHILE (2004), available at [http://www.unrisd.org/80256B3C005BCCF9/httpNetITFrame?ReadForm&parentunid=D0911BEE223DF74EC12570AC0032E4E2&parentdoctype=paper&netitpath=http://www.unrisd.org/published/\\_pp/\\_tbs/\\_riescopp/content.htm](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFrame?ReadForm&parentunid=D0911BEE223DF74EC12570AC0032E4E2&parentdoctype=paper&netitpath=http://www.unrisd.org/published/_pp/_tbs/_riescopp/content.htm).

20. See, e.g., Frynas, *supra* note 18, at 587 (outlining some failed CSR projects, such as unfinished buildings and health clinics without equipment or staff).

instance, building a town hall or health clinic in a mining community where the most apparent impact of the mining activity is large-scale environmental degradation or forced relocation of villages might be viewed as simply an attempt to buy off the community and create space to go on with business as usual. According to this theory, any CSR program that fails to address the most obvious negative consequence of the activity is insufficient and willfully off-point.<sup>21</sup>

CSR projects emphasize discrete measurable outcomes (which are more easily evaluated and publicized and may offer significant psychological benefits for employees and managers)<sup>22</sup> and are often not focused on longer term, more complicated problems. Discrete issues are easier to tackle, less daunting, and better suited to the management strategies of multi-national companies. Another aspect of direct community engagement—though one we are reluctant to label a pitfall—is that local communities are understandably focused on their immediate needs, such as access to water, medical care, and education.<sup>23</sup> These may very well be the most pressing needs of a community; however, durable solutions require striking at the root of the problem, which often lies in the incapacity and lack of accountability of government. The (very visible) absence of basic requirements in extractive communities is indicative of a more fundamental disease pervading resource-rich states. We explore this idea and its implications in the remainder of this article.

### III. UNDERSTANDING THE RESOURCE CURSE

A great deal has been written about the paradoxical inverse relationship between natural resource wealth and development in poor countries. While the discovery of vast amounts of natural resources offers hope that such wealth will lead to greater development, far too often, this is not the case. Resource-rich countries almost invariably develop more slowly than non-resource-rich countries.<sup>24</sup> Moreover, they are more susceptible to the outbreak of internal conflict,<sup>25</sup> may experience greater

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21. See Ralph Hamann, *Corporate Social Responsibility and its Implication for Governance: The Case of Mining in South Africa 16* (2003) (paper presented to Oikos PhD Summer Academy), available at [http://www.oikos-stiftung.unisg.ch/academy2003/paper\\_hamann.pdf](http://www.oikos-stiftung.unisg.ch/academy2003/paper_hamann.pdf) (describing field interviews with local community members affected by a mine, who expressed concerns that CSR efforts were not tackling the root causes of the social problems in the area—many of which related to the mine itself—and thus the CSR practices were seen as insufficient in the face of the negative impacts of the mining activity).

22. See Frynas, *supra* note 18, at 586 (stating that one of the many motivations for CSR is a company's desire to demonstrate to their employees that the company is playing a positive role in development given that public criticism of companies can be demoralizing for staff).

23. Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz, *Introduction to Escaping the Resource Curse* 1, 3-14 (Macartan Humphreys et al. eds., 2007).

24. See Sachs & Warner, *supra* note 3, at 4-10.

25. See Macartan Humphreys, *Natural Resources, Conflict and Conflict Resolution*, 49 J.

levels of corruption,<sup>26</sup> and generally have weaker democratic institutions.<sup>27</sup> And while certain segments of resource-rich societies have quite clearly benefited greatly from the exploitation of mineral resources, the high degree of inequality in such countries points to the fact that most have not. At the same time, the biggest success stories in the developing world, for example, the Asian Tigers, are comparatively poor in natural resources.

Early explanations for this paradox focused on largely economic factors, namely the effects of commodity price volatility and the Dutch-disease phenomenon. Volatility in commodities markets causes the export earnings of resource-rich countries to vary drastically over time. Volatility in income, some theorists argue, hinders long-term planning and is often accompanied by a “boom-bust” pattern of expenditures wherein “the benefits in the good years are transitory whereas the problems generated during the bad years endure.”<sup>28</sup> Research on this point, however, is not conclusive.<sup>29</sup> The Dutch Disease model, another largely economic explanation, describes a pattern wherein booms in one sector draw resources from other sectors while at the same time reducing competitiveness through real exchange rate appreciation. The Dutch Disease dynamic is widely observed,<sup>30</sup> but researchers have come to question its explanatory power, especially in the developing country context.<sup>31</sup> The fact that a range of policy tools exists by which governments can mitigate the effects of Dutch Disease—such as monetary sterilization, tight fiscal policies, or temporary subsidies to agricultural and manufacturing sectors<sup>32</sup>—also suggests that it is not the primary explanation for the resource curse. Indeed, the repeated failure of states to implement these widely known policy tools<sup>33</sup> suggests that economic explanations, though still important, do not suffice.

More recent research has looked instead at the political economy of the resource curse, focusing on the effects of mineral wealth on state institutions and accountability, and on the manner in which dependence

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CONFLICT RESOL. 508, 510-13 (2005).

26. See Xavier Sala-i-martin & Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria* 5-6 (Dep’t Economics, Columbia Univ., Working Paper No. 0203-15, 2003), available at [http://digitalcommons.libraries.columbia.edu/cgi/viewcontent.cgi?article=1081&context=econ\\_dp](http://digitalcommons.libraries.columbia.edu/cgi/viewcontent.cgi?article=1081&context=econ_dp).

27. See Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POLITICS 325, 356-57 (2001).

28. Humphreys, et al., *supra* note 23, at 8.

29. For a good overview, see Michael Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297, 297-322 (1999).

30. See, e.g., Humphreys et al., *supra* note 23, at 5.

31. See Ross, *supra* note 29, at 305-07. Ross notes that the Dutch Disease model assumes full utilization of a country’s capital and labor supply before the resource boom occurs. *Id.* at 305. In developing countries, where labor surpluses are common, the pull of resources to the booming sector has less of an effect on the non-booming sectors. *Id.* In addition, Ross notes that developing country manufacturers often import intermediate goods, which become cheaper with exchange rate appreciation, thus mitigating the negative effects of that appreciation. *Id.* at 305-06.

32. See *id.*

33. Humphreys, et al., *supra* note 23, at 3-14.



on oil exports shapes state institutions and restrains the range of political decision-making in ways that inhibit a state's capacity to direct development.<sup>34</sup> Rentier state theory, a central strand of this body of research, posits a tax-based social contract between citizens and state that is broken in many resource-rich states.<sup>35</sup> According to this theory, taxation gives citizens the leverage to make demands (i.e., the ability to withhold financial support) while also increasing their direct stake in the decisions of government. A largely untaxed citizenry lacks this leverage, leading to weaker links of accountability between citizen and state, which are crucial to the development and execution of economic and social policies directed at the needs and demands of society.<sup>36</sup>

Because state revenues in resource-rich countries are often largely disconnected from the success or failure of the broader economy, governments in these states are not as responsive to the needs of non-extractive sectors or demands for social investment as states drawing on a broad tax base.<sup>37</sup> Since the bulk of the wealth in resource-rich states typically accrues to a small number of companies and institutions and the individuals controlling them, the incentives to build up effective governance structures to efficiently and equitably manage and distribute those revenues are weak, especially in the face of competing incentives to utilize political machinery to capture the rents associated with natural resource extraction. Thus, necessary long-term investments, such as investments in education, often go wanting.<sup>38</sup>

While this phenomenon can be present in other single-sector economies, natural resource-rich countries present an extreme case because of the typical structure of the extractive sector.<sup>39</sup> Thus, for example, the

34. See, e.g., Terry Lynn Karl, *Ensuring Fairness: the Case for A Transparent Fiscal Social Contract*, in *ESCAPING THE RESOURCE CURSE* 256, 259 (Macartan Humphreys et al. eds., 2007) ("Petro-states suffer from a double perverse effect: their states, so often formed during the period of oil extraction, are skewed by the imperatives of resource extraction, but the intensification of the resource dependence that accompanies state-building subsequently produces even further decay in critical arenas such as non-mineral-based revenue raising, expenditure patterns, fiscal accountability, and citizen participation.").

35. See, e.g., Mick Moore, *Death Without Taxes: Democracy, State Capacity, and Aid Dependence in the Fourth World*, in *THE DEMOCRATIC DEVELOPMENTAL STATE* 82 (Mark Robinson & Gordon White eds., 1998).

36. See generally Hossein Mahdavy, *The Patterns and Problems of Economic Development in Rentier States: The Case of Iran*, in *STUDIES IN THE ECONOMIC HISTORY OF THE MIDDLE EAST* 428 (M.A. Cook ed., 1970); Hootan Shambayati, *The Rentier State, Interest Groups, and the Paradox of Autonomy: State and Business in Turkey and Iran*, 26 *COMP. POL.* 307 (1994) (concluding that reliance on rents leaves states ill-equipped to engage in political negotiations with key domestic groups).

37. See Humphreys et al., *supra* note 28, at 12; *ORG. FOR ECON. COOPERATION & DEV., DEV. ASSISTANCE COMM., GOVERNANCE, TAXATION AND ACCOUNTABILITY: ISSUES AND PRACTICE 2* (2007), available at <http://www.oecd.org/dataoecd/52/35/40210055.pdf> [hereinafter OECD].

38. See Humphreys et al., *supra* note 28, at 10.

39. See D. MICHAEL SHAFER, *WINNERS AND LOSERS: HOW SECTORS SHAPE THE DEVELOPMENTAL PROSPECTS OF STATES* 10, 231-32, 272 (1994). Shafer notes that the extractive sector in resource-rich states is typically characterized by (1) dominance by a small number of large firms, (2) high barriers to entry, and (3) high levels of asset specificity, all of which lead to exceptionally strong rent-seeking behavior by firms and, partially in response to this

great influx of income into the Middle Eastern oil exporters between 1973 and 1983 allowed them to “postpone the creation of alternative mechanisms for the expression and reconciliation of conflicting economic claims and interests,” making subsequent efforts at reform more difficult.<sup>40</sup> Similar observations have been made about Iran, with theorists arguing that Iran’s financial autonomy allowed it to function without regard to significant social groups, leaving it unaccustomed to the necessary process of inter-group negotiation during financial crises.<sup>41</sup>

State-citizen accountability in resource-rich states is further diminished by the ability of power brokers to buy off opposition forces within the government—and to fund repressive internal security to marginalize opposition within civil society—with unearned and abundant mineral rents.<sup>42</sup> This pattern of diminished accountability leads not only to a failure of will or attention, but also to a failure of core capacity, as the institutions that facilitate a sense of accountability (for example, a bureaucratic taxing authority) atrophy or fail to develop.<sup>43</sup> Thus, there is an element of path-dependency that makes the task of eventual reform ever more challenging.<sup>44</sup>

Corruption also plays a key role in the resource curse and is a central feature of the political economic theories discussed above. While corruption is observed in practically any political or economic system, corruption in resource-rich countries has tended to be especially entrenched and pernicious. Corruption flourishes in environments where there is vast wealth to be distributed by a relatively small number of individuals in an environment characterized by high levels of secrecy. Where information about the size of oil or mineral wealth endowments in a country is typically protected (e.g., by confidentiality clauses in contracts), and the terms of agreements for the monetization of those endowments are similarly withheld from public scrutiny, opportunities for corruption are vast.<sup>45</sup> Such secrecy, more so than in other sectors, is the norm in the extractive industries.<sup>46</sup> Further, the weak institutional environment in many resource-rich states makes corruption that much easier.

One last factor in the resource curse worth mentioning (which we return to in more detail in Part V) is the effect of weak institutions on the ability of the government to collect fair value from its natural resources.

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pressure, a tendency for states to offer high levels of protection to the industry.

40. Kiren Aziz Chaudhry, *Economic Liberalization and the Lineages of the Rentier State*, 27 COMP. POL. 1, 19 (1994).

41. See Mahdavy, *supra* note 36, at 467.

42. See, e.g., OECD, *supra* note 37, at 2-4.

43. See, e.g., Moore, *supra* note 35, at 106.

44. See generally TERRY LYNN KARL, *THE PARADOX OF PLENTY: OIL BOOMS AND PETRO STATES* (1997).

45. See, e.g., Paul Ocheje, *The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa*, 8 J. SUSTAINABLE DEV. IN AFR. 222, 225 (2006), available at [http://www.jsdafrica.com/Jsda/Fall2006/PDF/Arc\\_the%20Extractive%20Industries%20Transparency%20Initiative.pdf](http://www.jsdafrica.com/Jsda/Fall2006/PDF/Arc_the%20Extractive%20Industries%20Transparency%20Initiative.pdf).

46. See Karl, *supra* note 32, at 265-69.

Power imbalances at the negotiating table very often result in unfavorable deals being struck,<sup>47</sup> and states afflicted by the resource curse typically lack the institutional capacity to prevent cheating in the collection of revenues.<sup>48</sup> Both of these failures rob states of valuable resources, thus handicapping efforts to translate those resources into development.

For purposes of this article, which addresses the role of corporations in resource-rich countries, the salient feature of the resource curse is the fact that the institutional failure is, at its heart, dynamic and self-reinforcing. It is both an outcome and a variable, with the weakness attributable to resource-rent dependence leading to ever greater dependency through the progressive weakening of institutions.<sup>49</sup> This vicious and also dynamic cycle helps to explain the intractability of the resource curse and highlights the need for concerted effort on the part of all stakeholders in the extractive industries.

#### IV. INTERACTION OF CSR AND THE RESOURCE CURSE

Resource curse theories suggest that CSR practitioners cannot treat institutional weakness and underlying political dynamics in natural resource-dependent states as merely conditions of the operating environment; they are more appropriately seen as targets of CSR in their own right. The more immediately apparent problems in mining communities can thus be viewed, to some extent, as second-level consequences of the extractive activity, attributable at least in part to institutional failures at a systemic level. With a better understanding of the political economy of resource-rich countries, the lack of safe drinking water can be seen not only as the direct result of the polluting activity of the local extractive company, but also, to a great extent, as an indirect result of government failure to properly regulate environmental practice.<sup>50</sup> Likewise, inadequacies that may not seem immediately related to the extractive activity in a given community—such as insufficient educational spending—can be viewed as indirectly attributable to the breakdown in government capacity and accountability that comes with dependence on resource revenues. Thus, any approach to CSR that incorporates notions of causation and responsibility should account for the role of extractive companies in resource curse dynamics. As one scholar has argued: “If oil firms are expected to take responsibility for oil spills, they could equally be expected to take responsibility for their contribution toward the decline of non-oil producing sectors of the economy. However, current CSR approaches do not envisage conferring such a responsibility on firms.”<sup>51</sup>

47. See Humphreys et al., *supra* note 28, at 4-5.

48. See Joseph E. Stiglitz, *What is the Role of the State?*, in ESCAPING THE RESOURCE CURSE 24, 24 (Macartan Humphreys et al. eds., 2007).

49. See, e.g., Karl, *supra* note 44, at 342.

50. See, e.g., Frynas, *supra* note 18, at 596.

51. Frynas, *supra* note 18, at 587. Some critics might argue that this is precisely the point of CSR—to distract from more of the fundamental issues. We would say that while there may

Given the pressures and incentives driving many CSR programs—and the complexity of resource curse dynamics—is not surprising that such programs would fail to address the institutional weaknesses at the heart of the resource curse. Central to the problem is a lack of understanding of the forces at play, exacerbated, as Blowfield and Frynas argue, by a failure of will: “Cutting across this absence of a structural understanding is an inability or unwillingness to consider causality...[i]t does nothing to encourage examination of the complexity of multilayered, structurally-rooted problems or the role of business within them.”<sup>52</sup> Furthermore, companies face clear incentives to engage in locally-focused, discrete CSR activities. Discrete projects are more likely to have measurable (or at least easily understood) outcomes, which of course play best with both home country and host country constituencies and are often most amenable to the skills and mindsets of the companies and managers. The incentives to direct CSR activities toward more systemic issues are less immediately apparent, but as our understanding of the resource curse grows and an emphasis on systemic factors becomes embedded in the discourse surrounding the effects of the extractive industry on society, it seems logical that CSR theorists and practitioners will have to grapple more and more with the disconnect between largely localized CSR agendas and the systemic causes of the resource curse.

The key question is whether CSR agendas that fail to address the institutional, systemic externalities of extractive activities are simply inadequate or whether they could actually be harmful. If one assumes that the range of possible options for a CSR program all target real needs or varying degrees of significance, it is fair to ask how any assortment of those options could lead to negative outcomes. There are two ways this could happen: (1) pursuit of lower-impact CSR activities could “divert” attention from more significant needs or even undercut the ability of stakeholders to make additional demands, or (2) a CSR program could actually exacerbate the institutional weakness underlying the resource curse by usurping functions more appropriately fulfilled by the state and thereby undercutting political accountability.

A number of commentators have noted the potential for CSR programs to distract from more pressing problems, whether unintentionally or by design. Such criticisms apply more directly to the distinct set of activities grouped under the heading “corporate philanthropy”—which is sometimes understood as deliberately designed to “placate community demands” and “undermine the ability of aggrieved groups to make political demands which may threaten continued ‘goodwill’ on the part of the company”<sup>51</sup>—but they are also relevant to the discussion of CSR

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be some truth to these criticisms in certain cases, there is also an argument that the failure to address these issues reflects not a willful manipulation but rather the state of current CSR theory. A lack of understanding of the economic interactions and implications may be the real reason CSR practices are falling short of critics’ expectations.

52. Blowfield & Frynas, *supra* note 6, at 510-11.

generally.<sup>53</sup> Hamann observes that corporate social investments in South African mining communities have been perceived as failing to “tackle the root causes of the social problems in the area . . . including, for instance, employee housing policies.”<sup>54</sup> Housing policies may very well rank above the CSR activities of the companies Hamann describes, but resource curse theory would suggest that this is not the first order problem. A better understanding of the resource curse thus informs CSR theory and practice by allowing for a more accurate ranking of needs, so that core problems are not ignored for the sake of those more easily addressed.

The distraction paradigm indicates that misdirected CSR may indeed pose a risk by skewing incentive structures such that demands are not made. But where the central problem in resource-rich countries is a lack of institutional accountability, a CSR model that calls for the private sector to fill governance gaps may be more than a distraction; it may directly impact state capacity and exacerbate failures of accountability by effectively letting the state off the hook. As Frynas states,

[I]t is arguable that CSR may provide a lose-lose outcome for a country's governance: governance failures lead to calls for a role of CSR in development; usually CSR is unable to pay such a positive developmental role, but even if CSR could play such a role, this would ease the pressure on the government to undertake a developmental role itself.<sup>55</sup>

This is a theoretical risk in any sector, but resource curse dynamics suggest that the risk is greater in resource-rich states. The implications of this notion for socially conscious extractive companies are troubling. Understandably, extractive companies face pressure from the communities in which they operate as they are often the only local actor with the capacity to provide crucial social goods and services.<sup>56</sup> Hamann argues that “citizens may question the government's role as primary service provider if a locally operating company has greater resources and capacity and therefore is able to provide goods and services in the near term more quickly and efficiently than the government.”<sup>57</sup> The danger is that this lack of confidence may lead to unsustainable dependencies.

We would argue that the “lose-lose” scenario is not inevitable, however, provided that any agenda of local redress is pursued

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53. Peter Newell, *Citizenship, Accountability and Community: The Limits of the CSR Agenda*, 81 INT'L AFF. 541, 546-47 (2005).

54. Hamann, *supra* note 21, at 16.

55. Frynas, *supra* note 18, at 596; *id.* (noting that “even if CSR in the oil industry were to develop best practices and deliver development effectively, then there would be even less pressure on governments . . . to provide such benefits”); Ward, *supra* note 8, at 9 (noting the risk that the CSR agenda can “[distract] from the need to tackle fundamental issues of public governance”).

56. See Hamann, *supra* note 21, at 2.

57. *Id.*

concurrently with an agenda aimed at mitigating institutional failures. Near-term basic needs should certainly be met by whatever means possible and it would be quite heartless to argue otherwise, provided that the short-term solutions are not pursued to the exclusion of longer-term efforts to address systemic issues. In the long run (and extractive industry investments are often characterized by long investment horizons), any CSR program must address the institutional issues at the heart of the resource curse, regardless of what other issues are on the CSR agenda.

### V. SETTING CSR AGENDAS: THE PRACTICAL IMPLICATIONS OF THE RESOURCE CURSE

If CSR programs must, at a minimum, target institutional incapacities in resource-rich states, the key question is what this means for companies in practical terms. What role can a company play to facilitate the creation of the social contract between citizen and state? We would argue that the social contract requires that citizens have the leverage to demand effective governance from the state. Where citizens do not have leverage, government officials may face only weak incentives to govern accountably. As discussed in Part III, taxation provides a key leverage point in societies with broad tax bases; in a resource-rich society with a narrow tax base, the lever of taxes is less powerful. While access to information is vital in both types of societies in order for citizens to apply their leverage in a targeted and constructive manner, it is especially important in the latter case, as weaker weapons demand greater precision. Accordingly, transparency is absolutely essential to a stable social contract in countries heavily dependent on extractive industry revenues.

#### A. Transparency

The lack of governmental accountability at the heart of the resource curse is facilitated by the lack of information flowing between the government and the people.<sup>58</sup> The lack of transparency of natural resource revenue flows in many resource-rich developing countries provides cover for corruption on a massive scale. Between 1997 and 2002, approximately four billion dollars of oil money went missing in Angola,<sup>59</sup> and it is widely suspected that a number of government officials in resource-rich states have secreted away billions in offshore accounts.<sup>60</sup> This flagrant corruption

58. See, e.g., TRANSPARENCY INT'L, USING THE RIGHT TO INFORMATION AS AN ANTI-CORRUPTION TOOL 5 (2006), available at [http://www.transparency.org/content/download/9633/66877/file/TI2006\\_europe\\_access\\_information.pdf](http://www.transparency.org/content/download/9633/66877/file/TI2006_europe_access_information.pdf).

59. Press Release, Human Rights Watch, Angola: Account for Missing Oil Revenues, Disappearance of U.S. \$ 4.2 Billion Undermines Fundamental Rights 1 (Jan. 13, 2004), available at <http://www.hrw.org/english/docs/2004/01/12/angola6925.htm>.

60. For instance, Nursultan Nazarbayev, President of Kazakhstan, is suspected of divesting some of his nation's considerable oil revenues into a private Swiss bank account.

could not continue in an environment of disclosure and public scrutiny.

Transparency is a broad concept, encompassing the availability of a variety of types of information to enable public scrutiny. While transparency as a rule fosters accountability and good governance,<sup>61</sup> we would argue that transparency of revenue streams and financial arrangements in the extractive sector is of particular importance for the prospect of good governance in resource-rich states. The all-too-common opacity of resource revenues exacerbates the resource curse. If one of the chief causes of the resource curse is breakdown of government accountability, transparency arguably represents a practical counterweight by giving citizens the information they need to make demands on their government for the responsible dispersal of natural resource revenues. The availability of information is especially restricted in resource-rich states where individuals are largely untaxed and thus lack one of the primary sources of leverage over government decision-making. With the financial relationship between states and extractive firms laid bare, citizens have the information necessary to exert pressure on government in order to allocate its resources toward poverty alleviation and development programs.<sup>62</sup>

Extractive companies have a vital role to play in fostering this environment of transparency. We argue that support for natural resource revenue transparency should be central to any CSR program in the extractive sector, whether that program is designed with an emphasis on the company's role in development or to address the impact of the firm's investments. While companies cannot dictate the behavior of sovereign nations, they can directly impact the social contract between citizen and state through modification of their own corporate behavior. Some firms, for instance, have chosen to unilaterally disclose the payments they make to host governments.<sup>63</sup> Disclosure of key information about a company's economic relationship with the states can directly impact the links of accountability by arming citizens with information essential to hold their government to account.<sup>64</sup> Unilateral disclosure can only go so far, of

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Steve Levine & John Tagliabue, *Swiss Freeze Bank Account Linked to Kazakh President*, N.Y. TIMES, Oct. 16, 1999. Global Witness, a U.K.-based non-governmental organization, has accused Nazarbayev of taking some U.S. \$ 78 million dollars in "kickbacks" from oil companies in exchange for unspecified favors, and alleges that he controls a "secret fund" in Switzerland containing over U.S. \$ 1 billion dollars. GLOBAL WITNESS, TIME FOR TRANSPARENCY: COMING CLEAN ON OIL, MINING, AND GAS REVENUES 7-17 (2004), available at [http://www.globalwitness.org/media\\_library\\_detail.php/115/en/time\\_for\\_transparency](http://www.globalwitness.org/media_library_detail.php/115/en/time_for_transparency).

61. See, e.g., U.K. DEP'T FOR INT'L DEV., MAKING GOVERNANCE WORK FOR THE POOR 40 (2006), available at <http://www.dfid.gov.uk/wp2006>.

62. See, e.g., Ward, *supra* note 8, at 8.

63. The Canadian oil company Talisman chose to begin voluntarily publishing their revenue data because they "believed . . . that an important first step in establishing greater economic transparency can be achieved through the public disclosure of revenue payments to host governments." TALISMAN ENERGY, CORPORATE RESPONSIBILITY REPORT 36 (2005), available at [http://www.talisman-energy.com/cr\\_online/2005/econ-transparency.html](http://www.talisman-energy.com/cr_online/2005/econ-transparency.html); Newmont Mining, the American mining company also discloses their payments on a country-by-country basis. Newmont, *supra* note 13, at 48.

64. The Organization for Economic Cooperation and Development (OECD) undertook a

course, and the ultimate objective must be transparency across all actors in a given resource-rich state.<sup>65</sup> In this regard, support for international initiatives aimed at addressing the resource curse through greater transparency ought to be part of any CSR agenda.

A focal point for the movement to promote greater transparency is the Extractive Industries Transparency Initiative (EITI), an international multi-stakeholder initiative comprised of oil, gas and mining companies, governments, and civil society. Countries that commit to implementing EITI require all extractive companies operating within that country to report their oil, gas and mining payments, which are then reconciled against reported receipts from the government and made public.<sup>66</sup> While EITI does not lead to complete transparency of revenue flows (a full picture of the economic relationship between companies and states would require, for instance, transparency of the underlying contracts), it does place a significant amount of information in the hands of citizens, which holds great promise for the creation of a meaningful social contract.

EITI is by nature a voluntary initiative at the state level; but within implementing countries, compliance with EITI reporting is effectively mandatory, either carrying the force of law<sup>67</sup> or constituting a de facto requirement for continued extractive activities. The fact that EITI applies equally across the extractive sector in an implementing country creates a level playing field for all the companies, and thus addresses the disincentives to transparency that companies may face in a context of purely voluntary disclosure.

A crucial component of EITI, and one that highlights the role that companies can play in fostering accountable governance, is its requirement that there be meaningful participation of three stakeholder groups: governments, companies and civil society.<sup>68</sup> In many resource-rich countries, the development of a robust and free civil society has been hindered by repressive and authoritarian regimes, the prevalence of which

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comparative study on OECD member countries' citizens' access to information, concluding that "educated well-informed citizens expect governments to take their views and knowledge into account when making decisions on their behalf." MARC GRAMBERGER, OECD, CITIZENS AS PARTNERS: OECD HANDBOOK ON INFORMATION, CONSULTATION AND PUBLIC PARTICIPATION IN POLICY-MAKING, 15-16, 18-20 (2001), *available at* <http://213.253.134.43/oecd/pdfs/browseit/4201141E.PDF>.

65. We do not mean to suggest that unilateral disclosure of revenue payments is not worthwhile. To the contrary, such voluntary disclosure—in addition to getting valuable information into the public domain—is vital to creating a paradigm shift in the extractive industries that will enable the emergence of transparency as the norm, rather than the exception.

66. For a full list of validation criteria, see EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, VALIDATION GUIDE (2006), *available at* <http://issuu.com/eiti/docs/validationguide>.

67. See NEITI Act (2007) (Nigeria) (on file with author). Companies operating in countries that have signed up to EITI must report as part of their operating procedures.

68 EITI INTERNATIONAL ADVISORY GROUP, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE VALIDATION GUIDE 13-14 (2006), *available at* <http://eititransparency.org/files/document/validationguide.pdf>.



is a symptom of the resource curse.<sup>69</sup> An active civil society with the leeway to operate is crucial to the creation of a social contract between citizens and the state. In mandating the involvement of civil society in the process, the EITI framework represents a significant step forward in strengthening the systems of accountability.

While EITI is still too new to draw decisive conclusions about its efficacy, there are indications that it holds promise. For example, open budgeting and expenditure transparency are recognized as powerful means of fostering state accountability,<sup>70</sup> and even though EITI does not address expenditures, civil society groups in Ghana and Gabon report that the increased transparency around revenue streams as a result of EITI has led directly to more substantive public discussions about where that money is going. Similarly, groups in the Niger Delta acknowledge that the information they have obtained through the Nigerian EITI process has led them to shift their focus from getting the oil companies to pay more to demanding an accounting from local governments of the large sums they have received. Time will tell whether these demands result in improved governance, but indications are positive.

While the onus for implementing EITI is on the governments themselves, companies play a central role in encouraging countries in which they operate to implement EITI and to comply with the process once it is initiated. Equatorial Guinea, a small, oil-rich autocratic nation in Africa, recently signed on to EITI in no small part due to the encouragement of ExxonMobil, one of that country's major operators.<sup>71</sup> One can only speculate as to ExxonMobil's motivations for playing such a proactive role, though it is not difficult to understand some of the incentives that may have driven its decision. Equatorial Guinea is arguably one of the worst examples of the resource curse and systemic opacity.<sup>72</sup> The President of Equatorial Guinea, Teodoro Obiang Nguema, once told the BBC that information about oil revenues was a "state secret,"<sup>73</sup> and it is easy to understand why he felt this way. With a population of only

69. See, e.g., Humphreys et al., *supra* note 28, at 11-13.

70. U.N. ECON. COMM'N FOR AFRICA, DEV. POL'Y MGMT. DIV., AIDE-MEMOIRE, PUBLIC FINANCIAL MANAGEMENT AND ACCOUNTABILITY FOCUSING ON BEST PRACTICES IN THE CONTEXT OF BUDGET TRANSPARENCY 2-3 (2005), available at <http://www.uneca.org/dpmd/events/Aide%20Memoire%20AEGM%20Sept%202005%20final.doc>.

71. In its 2006 corporate citizenship report, ExxonMobil states that it has "played a key role in assisting countries such as Azerbaijan, Kazakhstan, and Nigeria in their efforts to implement EITI." EXXONMOBIL, *supra* note 13, at 38. Their future plans for 2007-08 include "[w]ork[ing] with interested governments as they move toward transparency in managing their oil and gas interests." *Id.* at 11. "We have engaged in dialogue with the Angolan government to encourage them to move toward more open and transparent processes in managing their oil and gas interests." *Id.* at 38.

72. Equatorial Guinea consistently ranks as one of the most corrupt countries in the world, according to Transparency International. See TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 7 (2007), [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2007](http://www.transparency.org/policy_research/surveys_indices/cpi/2007).

73. *Country Profile: Equatorial Guinea*, BBC News, Jan. 26, 2008, [http://news.bbc.co.uk/2/hi/africa/country\\_profiles/1023151.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/1023151.stm).

600,000,<sup>74</sup> the government of Equatorial Guinea receives an annual income from oil thought to be nearly U.S. \$ 6 billion dollars.<sup>75</sup> Despite this tremendous influx of wealth, the lives of average Equatoguineans are quite bleak – the vast majority of the population lives in abject poverty without access to water, health care, or education.<sup>72</sup> In 2004, the Senate Permanent Subcommittee on investigations found that U.S. oil companies had deposited millions of dollars into the personal bank account of President Obiang.<sup>76</sup> The President owns several mansions in the United States, and his son purchased one of the most expensive pieces of real estate in history, a U.S. \$ 35 million mansion in Malibu, despite an official salary of only U.S. \$ 5,000 per month.<sup>77</sup> Despite this historical aversion to transparency, the Equatorial Guinean government committed to EITI, and in February 2008, Equatorial Guinea was admitted as a candidate country. Time will tell whether implementing EITI and publicly disclosing revenue data will lead to amelioration of the stark contrast between the enormous oil wealth of the elite and some of the worst poverty in the world. Equatorial Guinea has a long road to travel before it will be a fully validated member of EITI (which requires international auditing of its participation in the process), but the fact that it has come this far has surprised many and is testament to how far the acceptance of EITI and the notion of transparency has come. It is also a testament to the power of individual companies to take steps with the potential to improve governance and accountability.

Companies participating in EITI and committed to transparency view it as good for business and as a necessary component of increasing accountability in a country. In its 2006 Corporate Citizenship Report, ExxonMobil stated:

Transparency initiatives are designed to increase disclosure of financial information and are fundamental to good governance. They can result in greater accountability by government leaders on how they spend their country's revenues. This helps stabilize the

74. UNITED NATIONS, DEP'T OF ECON. & SOC. WELFARE, WORLD POPULATION PROSPECTS: THE 2006 REVISION 58 (2006), available at [http://www.un.org/esa/population/publications/wpp2006/WPP2006\\_Highlights\\_rev.pdf](http://www.un.org/esa/population/publications/wpp2006/WPP2006_Highlights_rev.pdf).

75. U.S. DEP'T OF STATE, BACKGROUND NOTE: EQUATORIAL GUINEA (2008), <http://www.state.gov/r/pa/ei/bgn/7221.htm>.

76. INTERNATIONAL MONETARY FUND, REPUBLIC OF EQUATORIAL GUINEA: 2006 ARTICLE IV CONSULTATION STAFF REPORT 8 (2006), available at <http://www.imf.org/external/pubs/ft/scr/2006/cr06233.pdf>

76. Terence O'Hara & Kathleen Day, *Riggs Bank Hid Assets Of Pinochet, Report Says, Senate Probe Cites Former U.S. Examiner*, WASH. POST, July 15, 2004, at A01. The subcommittee went on to recommend in its report that oil companies be required to publicly disclose their payments to foreign governments to avoid similar scenarios in the future. Justine Blum, *U.S. Oil Firms Entwined in Equatorial Guinea Deals, Riggs Probe Led to SEC Inquiry on Corruption, Profiteering*, WASH. POST, Sept. 7, 2004, at E01.

77. See, e.g., Chris McGreal & Dan Glaister, *The Tiny African State, the President's Playboy Son and the \$35m Malibu Mansion*, GUARDIAN, Nov. 10, 2006, available at <http://www.guardian.co.uk/world/2006/nov/10/equatorialguinea.danglaister>.

investment climate of a country, which is critical for attracting the large-scale investments necessary for meeting the world's growing energy demands.<sup>78</sup>

In addition, transparency may also help companies improve their relationship with the communities in which they work. It is harder to do business in a community with disgruntled citizens who see no benefit to the exploitation of their resources because of government's mismanagement of natural resource wealth. For example, the Movement for the Emancipation of the Niger Delta (MEND), created in 2006, employs tactics that include kidnappings and attacks on oil pipelines. Their actions have reduced oil outputs in the region by roughly one-third.<sup>79</sup> At least 500,000 barrels of oil go missing each day.<sup>80</sup> At over a U.S. \$ 100 a barrel, the cost to business is easy to calculate. Although the companies are not entirely to blame for the government's failings, they are easier targets for the people to focus their energies. They often have more capacity for change than the government. Transparency, one hopes, can serve to relieve pressure on companies to some extent and to direct an appropriate share of it on to governments, thereby fostering a sense of accountability. Transparency also has reputational and public relations benefits for companies as they face increased scrutiny from watchdog organizations and sophisticated networks of activists.<sup>81</sup>

The power of these incentives has led to increased engagement by companies in the transparency movement. Twenty-one companies have officially stated their international support for EITI,<sup>82</sup> and institutional investors worth U.S. \$ 14 trillion have publicly stated their support for EITI and transparency, stating that it is in the best interest of business and investment.<sup>83</sup> Company and investor buy-in logically enhances government incentives to improve transparency, as governments are keen to cater to the demands of potential investors.

78. EXXONMOBIL, *supra* note 13, at 40.

79. Stephanie Hanson, Council on Foreign Relations, MEND: The Niger Delta's Umbrella Militant Group, Mar. 22, 2007, <http://www.cfr.org/publication/12920/mend.html>.

80. *Id.*

81. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, EITI BUSINESS GUIDE: HOW COMPANIES CAN SUPPORT IMPLEMENTATION 8 (2008), *available at* <http://www.eitransparency.org/files/document/EITI%20Business%20Guide.pdf>.

82. For a complete list of which companies have formally endorsed EITI, see <http://www.eitransparency.org/implementingcountries> (last visited Apr. 18, 2008). It should be noted that even companies that have not formally signed up to EITI are willing to disclose. For example, in Mauritania's recent EITI report, CNPCI (China National Petroleum Corporation International), which has not formally endorsed EITI, disclosed their payments, an event previously thought to be highly unlikely. See COMITE NATIONAL INITIATIVE SUR LA TRANSPARENCE DES INDUSTRIES EXTRACTIONNES, ISLAMIC REPUBLIC OF MAURITANIA, RAPPORT NATIONAL POUR LA TRANSPARENCE DES INDUSTRIES EXTRACTIONNES 32 (2005), *available at* <http://www.cnitie.mr/documentspublic/RapportITIE.pdf>.

83. Press Release, EITI Investor Group, Investors Statement on Transparency in the Extractives Sector (Oct. 2006), *available at* <http://archive.revenuewatch.org/reports/EITI%20Investor's%20Statement.pdf>.

While transparency is not a panacea, it does offer hope for improved governance in resource-rich states. As Karl notes, “[t]ransparency is not a stand-alone tool, and it is only a start. But if it is seen as a prerequisite to other types of state and market reforms, it promises real payoffs for managing expectations, reducing social tensions, and providing more stability.”<sup>84</sup> Transparency is thus a necessary, but not sufficient, component of accountability. As a goal of CSR programs, however, it has certain disadvantages. Because a lack of transparency is not always the most obvious problem in an extractive community lacking fresh water, electricity, or basic educational and health services, it may not rise to the top of the list in a company that has limited resources budgeted for its CSR program. Transparency is also harder to measure or verify than, for example, direct provision of health care or infrastructure. It is even less tangible in many ways than something like improved safety standards, which will be directly experienced by many members of an extractive community. However, the fact that improved transparency holds the promise of indirectly strengthening state institutions that might someday have the capacity to meet these needs makes it an indispensable part of any CSR program.

## B. CSR and Taxes

Part III touched upon one of the more important ways in which the institutional anemia central to the resource curse feeds into a vicious circle: the persistent failure of countries to realize fair value for their natural resources. Governments very often get less than they should for their natural resources as information asymmetries and imbalances in the levels of expertise on negotiating teams can result in bad deals being struck. Weak fiscal regimes are also a persistent problem and can handicap governments even before production has commenced.<sup>85</sup> During production, inadequate enforcement of contractual or statutory provisions may further decrease a government’s realized share of resource rents.<sup>86</sup>

It may seem contradictory to argue, on the one hand, that rent-seeking activity and the resulting breakdown in systems of accountability are central to the dynamics of the resource curse and, on the other hand, that a failure to capture a greater share of rents for the state is also to blame. If rent seeking within the state lies at the heart of the resource curse, one might be tempted to argue that increasing the amount of those rents would only exacerbate the problem. This line of reasoning, however, should not lead one to conclude that getting a fair deal is not in the best interests of a country. Mineral resources are, after all, finite; foregone revenues cannot be recovered. Where it may be perceived as politically infeasible to leave

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84. Karl, *supra* note 34, at 278.

85. See, e.g., Humphreys et al., *supra* note 28, at 4-5.

86. See, e.g., Stiglitz, *supra* note 48, at 24-25.

resources in the ground until such time as institutions for managing their extraction can be put in place, any government effort to capture a greater share of mineral rents (for instance, the numerous contract review and renegotiation processes currently seen throughout Africa and elsewhere) should be accompanied by serious efforts to strengthen those institutions, not least through the creation of robust transparency mechanisms.<sup>87</sup>

Because the fundamental relationship between extractive companies and the states in which they operate is an economic one, it is worth considering how this relationship should inform CSR theory and practice. Taxes and royalties are at the heart of the relationship between a company and a government and have more impact on a country than any CSR project could, but corporate policy around these payments are nonetheless not included in any CSR plans beyond corporate conduct statements in support of respect of laws.<sup>88</sup> This is not especially surprising. More interesting is the relative lack of attention paid to taxes in the academic literature addressing normative concepts of CSR. To be sure, the issue has not been completely ignored,<sup>89</sup> but the greater body of CSR literature does not spend enough time on the question of taxes. Given the centrality of taxes in the corporate-state relationship, especially in resource-rich countries, we would argue that more thought needs to be given to the relative importance of CSR vis-à-vis fiscal policy and practice.<sup>90</sup>

Companies all over the world employ a number of means, both

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87. Karl highlights the difficulties inherent in this approach, looking specifically at the resource curse in oil-dependent states: "[M]any of the solutions proposed for overcoming the resource curse, which seem so very promising, are unlikely to work on their own and, instead, should be put forward as part of a larger process of political reform . . . . In sum, [these proposed solutions] require at least some of the very 'stateness' that is lacking in oil exporters." Karl, *supra* note 34, at 270-71.

88. See, e.g., Rhys Jenkins, *Globalization, Corporate Social Responsibility and Poverty*, 81 INT'L AFF. 525, 538-39 (2005).

89. See, e.g., Riesco, *supra* note 19, at 23 ("The CSR concept may be enhanced with the basic consideration that the first responsibility of corporations – particularly foreign corporations operating in less developed countries – is non [sic] other than [sic] paying their taxes as they are expected to.").

90. It is worth emphasizing the failure of CSR to address issues of taxation and fiscal arrangements between governments and companies. This failure is arguably indicative of the extent to which the debate has been constrained by current paradigms of the stakeholders on how they approach CSR. See Jenkins, *supra* note 88, at 538-39. It may also be the case that company perceptions of CSR are fundamentally at odds with any kind of compromise on tax minimization strategies. Or perhaps the absence of a meaningful fiscal component in current CSR theory is a result of CSR's usual place in the corporate structure: CSR programs are often run out of a separate unit from the core business unit and are not as integrated into core strategy decisions as they could be. Separating CSR from business functions, it may indicate a mindset that CSR belongs outside of the realm of the traditional money-making corporate structure. In many companies, CSR has begun to feature more prominently in high-level strategy as companies come to understand the importance of an integrated approach. Perhaps an optimist may say that the logical end point of this trend is for an eventual harmonization of CSR and core business strategy, but there are reasons to be skeptic as it is unlikely that CSR would ever supersede the adversarial competitive nature of negotiations and business practices. We would propose, however, that from a theoretical level, this failure of CSR theory to say more about taxes deserves a second look.

legitimate and illegitimate, for minimizing their tax payments.<sup>91</sup> The problem for resource-rich countries is that, for many of the reasons discussed herein, the systems they have in place for monitoring these practices and effectively collecting taxes are often anemic as a result of pervasive institutional incapacity. The challenge facing these weak institutions is made greater by the financial complexity of the extractive industries and, significantly, by its lack of transparency. Moreover, the notion of what qualifies as “legitimate practice” and what does not in minimizing a tax bill is not cut-and-dry. The use of transfer pricing to shift tax liabilities out of producing countries is ostensibly a legitimate practice, but it is also subject to tremendous abuse and can be difficult to monitor.<sup>92</sup> While means exist to facilitate the monitoring of these practices (such as requirements that companies use advance pricing agreements), such practices are under-utilized by resource-rich countries.

What, if anything, can CSR do to address such issues? Whereas transparency offers incentives to businesses as discussed herein, there is arguably a fundamental misalignment of interests between countries and companies when it comes to taxes.<sup>93</sup> Fiscal arrangements between companies and countries are generally determined through an adversarial negotiation process, and it is arguably naïve to propose that CSR contemplate that companies shoot themselves in the foot. This, perhaps, points up the fundamental inadequacy of voluntary modes of CSR to address the major externalities of business operations. The use of strategies to minimize tax burdens could have a more significant impact on host countries than any traditional CSR strategy possibly could,<sup>94</sup> but the incompatibility of such concerns with CSR—or at least with any purely voluntary conception of CSR—highlights the limits of CSR. Nevertheless, we propose that more research be undertaken to explore the creation of standards of tax practice that could be included in extractive companies’ CSR programs. To start with, although there appears to be a broad consensus that outright fraud as a means of minimizing a tax bill is

91. See, e.g., Jeffrey D. Gramlich & James E. Wheeler, *How Chevron, Texaco, and the Indonesian Government Structured Transactions to Avoid Billions in U.S. Income Taxes*, 17 ACCOUNTING HORIZONS 107, 107 (2003); Stiglitz, *supra* note 48, at 24-25.

92. See, e.g., Stiglitz, *supra* note 48, at 24-26.

93. Incentives are not necessarily misaligned in all cases. The current wave of mineral contract renegotiations across Africa and elsewhere highlights the importance of agreeing on contracts that are “socially and politically stable.” “Stabilization” in the context of mineral contracts usually refers to the mechanisms that lock in, for the life of the contract, the fiscal and regulatory terms in place at the time of contract signing. Socially and politically stable contracts, on the other hand, are those that can withstand the pressures that often come with changes in underlying economic conditions. For instance, windfall profits taxes or royalty and tax rates that adjust in response to increased commodity prices can provide companies with some degree of certainty about profitability while assuring states a politically and socially acceptable share of windfall profits during resource booms. Company and country incentives may thus be aligned around the creation of more flexible fiscal mechanisms. Nevertheless, even within the context of this shared interest, company and state incentives are fundamentally misaligned when it comes to the actual calculation and payment of revenues.

94. See generally Riesco, *supra* note 19, at 21.

unethical, there is a significant difference of opinion in the business, law, and tax policy communities as to where the line between fraud and acceptable tax planning lies. Thus, work on international tax practice standards specifically tailored to the extractive industries could be an important starting point worthy of more discussion.

## VI. CONCLUSION

There are other models of corporate social responsibility, beyond transparency and new thinking on fiscal relationships that have the potential to foster the development of accountability between a government and its citizens. For instance, certain modes of public-private partnership, including jointly managed social development funds where government is brought into the decision-making process, offer companies a constructive way to participate in the development agenda. The key is that such approaches do not cut out government and thereby hinder the development of a valid social contract. *The Economist* states it well: “[a]ll things considered, there is much to be said for leaving social and economic policy to governments. They, at least, are accountable to voters.”<sup>95</sup> This statement alludes to an important principle: corporations are not—and should not be required to become—development experts. Rather, they must not stand in the way of development and should at a minimum support those initiatives that attempt to address the key development challenges in the communities in which they operate. In the case of the extractive industries, this means supporting efforts to create systems of accountability between government and people. The government must be brought back into the equation in extractive communities where longstanding state incapacity has encouraged local groups to look to companies in order to meet their needs. Ideally, CSR should lead to a more significant role for governments in the execution of traditional state functions, starting with more effective capture and management of revenues and leading to more accountable and responsive expenditure policies. Transparency will facilitate this, but only to the extent that all the key members of society, including multinational and local corporations, support the transparency agenda and help to foster better accountability.

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95 *The Good Company*, *ECONOMIST*, Jan. 20, 2005, available at [http://www.economist.com/opinion/displaystory.cfm?story\\_id=E1\\_PVSSTQT](http://www.economist.com/opinion/displaystory.cfm?story_id=E1_PVSSTQT).